

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HABTOM O. TESFAMARIAM,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

No. CV-08-0213-CI

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DIRECTING ENTRY OF
JUDGMENT FOR PLAINTIFF

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 15, 21.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Richard A. Morris represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and **REMANDS** the case to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

On February 25, 2004, plaintiff Habtom O. Tesfamariam (Plaintiff) filed applications for disability insurance benefits (DIB) and supplemental security income benefits (SSI). (Tr. 114, 118-35, 612.) Plaintiff alleged disability due to bipolar disorder, schizophrenia, psychosis NOS, schizoaffective disorder and mental

1 illness, with an alleged onset date of June 1, 2002. (Tr. 114,
2 119.) Benefits were denied initially and on reconsideration.
3 Plaintiff then requested a hearing before an administrative law
4 judge (ALJ), which was held before ALJ R. J. Payne on May 1, 2007.
5 (Tr. 618-52.) Plaintiff, who was represented by counsel, and
6 medical expert Ronald Klein, Ph.D., testified. The ALJ denied
7 benefits on June 29, 2007. (Tr. 29-39.) The Appeals Council denied
8 review. (Tr. 4-6.) The instant matter is before this court
9 pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript
12 of proceedings, and are briefly summarized here. At the time of the
13 hearing, Plaintiff was 28 years old, single, with a tenth grade
14 education and graduate equivalency degree. (Tr. 637.) He had work
15 experience as a stocker in a department store, a laborer, a gutter
16 cleaner, and an auto detailer. (Tr. 639-42.) He testified he was
17 not able to work because of visual and auditory hallucinations that
18 were unchecked by his medication. (Tr. 642-43.) He stated his
19 medication also caused tremors and dry mouth. (Tr. 644.) Plaintiff
20 had a long history of substance abuse and psychiatric
21 hospitalizations for drug induced psychosis. He testified he had
22 used cocaine the month before the hearing. (Tr. 645.) He reported
23 living in mental health treatment facilities and participating
24 supported living programs and chemical dependency treatment
25 meetings. (Tr. 646-51.)

26 **ADMINISTRATIVE DECISION**

27 At step one, ALJ Payne found Plaintiff had not engaged in
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1 substantial gainful activity since the alleged onset date of June 1,
2 2002. (Tr. 32.) At step two, he found Plaintiff had the severe
3 impairments of "a schizoaffective disorder with psychotic features,
4 and a polysubstance abuse/addiction disorder." (Tr. 32.) At step
5 three, he determined Plaintiff's substance use disorder met Listing
6 section 12.09, and was therefore "disabled" with the effects of
7 substance abuse. (Tr. 34.) The ALJ then found that if Plaintiff
8 stopped the substance abuse "the remaining limitations would cause
9 more than a minimal impact on [his] ability to perform basic work
10 activities; therefore, the claimant would continue to have a severe
11 impairment or combination of impairments," but those impairments
12 without the consideration of substance abuse would not meet or
13 medically equal any of the Listings. (Tr. 34-35.) He determined
14 Plaintiff's substance use disorder was a contributing factor
15 material to the initial finding of disability. (Tr. 38.)

16 At step four, in his assessment of Plaintiff's residual
17 functional capacity (RFC), the ALJ found Plaintiff's impairments
18 without the effects of substance use could reasonably cause symptoms
19 alleged, but Plaintiff's statements regarding the intensity and
20 limitations were "not entirely credible." (Tr. 37.) ALJ Payne
21 concluded that if Plaintiff stopped the substance use, he would have
22 the RFC for "a wide range of gainful work activities at all
23 exertional levels." (Tr. 35.) However, he found Plaintiff had
24 never engaged in substantial gainful activity and, therefore, had no
25 significant past relevant work. (Tr. 37.) At step five, the ALJ
26 found without substance abuse, Plaintiff's ability to work would not
27 be affected by remaining non-exertional limitations. (Tr. 38.)

1 Applying the medical vocational guidelines (Grids) at step five, the
2 ALJ concluded if Plaintiff stopped his substance abuse, there were
3 other jobs in the national economy Plaintiff could perform. (*Id.*)
4 Based on the second sequential evaluation, the ALJ concluded
5 Plaintiff would not be disabled within the meaning of the Social
6 Security Act if he stopped the substance abuse. (*Id.*)

7 **STANDARD OF REVIEW**

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
9 court set out the standard of review:

10 A district court's order upholding the Commissioner's
11 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
12 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
13 Commissioner may be reversed only if it is not supported
14 by substantial evidence or if it is based on legal error.
15 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
16 Substantial evidence is defined as being more than a mere
17 scintilla, but less than a preponderance. *Id.* at 1098.
18 Put another way, substantial evidence is such relevant
19 evidence as a reasonable mind might accept as adequate to
20 support a conclusion. *Richardson v. Perales*, 402 U.S.
21 389, 401 (1971). If the evidence is susceptible to more
22 than one rational interpretation, the court may not
23 substitute its judgment for that of the Commissioner.
24 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
25 F.3d 595, 599 (9th Cir. 1999).

26 The ALJ is responsible for determining credibility,
27 resolving conflicts in medical testimony, and resolving
28 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

23 **SEQUENTIAL PROCESS**

24 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
25 requirements necessary to establish disability:

26 Under the Social Security Act, individuals who are
27 "under a disability" are eligible to receive benefits. 42
28 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"

1 which prevents one from engaging "in any substantial
2 gainful activity" and is expected to result in death or
3 last "for a continuous period of not less than 12 months."
4 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
5 from "anatomical, physiological, or psychological
6 abnormalities which are demonstrable by medically
7 acceptable clinical and laboratory diagnostic techniques."
8 42 U.S.C. § 423(d)(3). The Act also provides that a
9 claimant will be eligible for benefits only if his
10 impairments "are of such severity that he is not only
11 unable to do his previous work but cannot, considering his
12 age, education and work experience, engage in any other
13 kind of substantial gainful work which exists in the
14 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
15 the definition of disability consists of both medical and
16 vocational components.

17 In evaluating whether a claimant suffers from a
18 disability, an ALJ must apply a five-step sequential
19 inquiry addressing both components of the definition,
20 until a question is answered affirmatively or negatively
21 in such a way that an ultimate determination can be made.
22 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
23 claimant bears the burden of proving that [s]he is
24 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
25 1999). This requires the presentation of "complete and
26 detailed objective medical reports of h[is] condition from
27 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
28 404.1512(a)-(b), 404.1513(d)).

1 It is the role of the trier of fact, not this court, to resolve
2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
3 supports more than one rational interpretation, the court may not
4 substitute its judgment for that of the Commissioner. *Tackett*, 180
5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
6 Nevertheless, a decision supported by substantial evidence will
7 still be set aside if the proper legal standards were not applied in
8 weighing the evidence and making the decision. *Browner v. Secretary*
9 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
10 there is substantial evidence to support the administrative
11 findings, or if there is conflicting evidence that will support a
12 finding of either disability or non-disability, the finding of the

1 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
2 1230 (9th Cir. 1987).

3 ISSUES

4 The question is whether the ALJ's decision is supported by
5 substantial evidence and free of legal error. Plaintiff argues the
6 ALJ erred when he: (1) found substance abuse was a contributing
7 factor material to his disability; and (2) improperly rejected the
8 opinions of examining and reviewing medical sources. (Ct. Rec. 16.)

9 DISCUSSION

10 **A. Sequential Evaluation in the Context of Substance Addiction**

11 The Contract with America Advancement Act of 1996 (CAAA)
12 amended the Social Security Act, providing that "an individual shall
13 not be considered to be disabled . . . if alcoholism or drug
14 addiction would . . . be a contributing factor material to the
15 Commissioner's determination that the individual is disabled." 42
16 U.S.C. 423(d)(2)(C). Special statutes and regulations govern
17 disability claims that involve substance abuse.

18 Under the Regulations implemented by the Commissioner, the ALJ
19 must follow a specific analysis that incorporates the sequential
20 process discussed above. 20 C.F.R. §§ 404.1535(a), 416.935(a). The
21 ALJ must conduct the five-step inquiry without attempting to
22 determine the impact of substance addiction. If the ALJ finds that
23 the claimant is not disabled under the five-step inquiry, the
24 claimant is not entitled to benefits, and there is no need to
25 proceed with further analysis. *Id.* If the ALJ finds the claimant
26 disabled, and there is evidence of substance addiction, the ALJ
27 should proceed under the sequential evaluation and §§ 404.1535 or
28 416.935 to determine if the claimant would still be disabled absent

1 the substance addiction. *Bustamante v. Massanari*, 262 F.3d 949, 955
2 (9th Cir. 2001). If found disabled with the effects of substance
3 addiction, it is the claimant's burden to prove substance addiction
4 is not a contributing factor material to her disability. *Parra v.*
5 *Astrue*, 481 F.3d 742, 748 (9th Cir. 2007). As stated by the *Parra*
6 court, a drug addicted claimant "who presents inconclusive evidence
7 of materiality has no incentive to stop [abusing drugs], because
8 abstinence may resolve his disabling limitations and cause his claim
9 to be rejected or his benefits terminated." *Id.* Thus, through the
10 CAAA, Congress seeks "to discourage alcohol and drug abuse, or at
11 least not to encourage it with a permanent government subsidy."
12 *Ball v. Massanari*, 254 F.3d at 817, 824 (9th Cir. 2001).

13 Here, ALJ Payne found Plaintiff was disabled with the effects
14 of diagnosed substance abuse/addiction disorder at step three of his
15 first sequential evaluation. Specifically, he found Plaintiff's
16 diagnosed schizoaffective disorder as exacerbated by substance abuse
17 met the Listing for 12.09 (substance addiction disorder), 20 C.F.R.
18 Part 404, Subpart P, Appendix 1. (Tr. 34.) Excluding the effects
19 of substance use, the ALJ conducted a second sequential evaluation
20 and found at step two that Plaintiff "would continue to have" a
21 severe mental impairment of schizoaffective disorder. (*Id.*)

22 As discussed by the ALJ, the Social Security regulations
23 require the application of a special technique in evaluating the
24 mental impairments. (Tr. 34.) The Commissioner must first evaluate
25 the severity of the impairment, through the use of the PRTF, and
26 then (if the severity does not meet or equal a Listing), assess the
27 claimant's remaining functional capacity to do work related
28 activities, through the use of the mental RFC Assessment form. 20

1 C.F.R. §404.1520a, 416.920a; see *Maier v. Commissioner of Social*
2 *Sec. Admin.*, 154 F.3d 913, 915 (1998). In his step three findings
3 with the effects of substance abuse disorder, ALJ referenced the
4 written psychiatric review technique form (PRTF) completed by
5 medical expert Ronald Klein, Ph.D., in which Dr. Klein opined that
6 absent the consideration of substance addiction, Plaintiff's mental
7 disorder caused no restrictions on his activities of daily living,
8 mild difficulties maintaining social functioning, as well as
9 concentration, persistence or pace, and no episodes of
10 decompensation. (Tr. 34, 603.) Nonetheless, at step two of the
11 second sequential evaluation, the ALJ concluded Plaintiff's
12 schizoaffective disorder *without the effects* of substance
13 abuse/addiction caused more than minimal limitations on his ability
14 to perform work activities, and was, therefore, severe. (Tr. 34.)

15 Although Dr. Klein completed a written PRTF, he did not
16 complete a written mental RFC. However, Dr. Klein, testified that
17 although Plaintiff carried a diagnosis of schizoaffective disorder,
18 he would be employable if the effects of the substance
19 abuse/addiction were absent, but "one would have to select certain
20 jobs" for the Plaintiff, and Plaintiff "could not just go into the
21 open market" and be able to perform any given job. (Tr. 627.) Dr.
22 Klein even mentioned that Plaintiff may have symptoms of hearing
23 voices, but not every day, and not "preventing him from doing
24 gainful activity." (Tr. 628.)

25 As follow-up to this testimony, Plaintiff's counsel
26 specifically asked Dr. Klein what work-related functional
27 limitations Plaintiff would experience due to his mental disorder,
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1 without substance abuse. (Tr. 635.) Dr. Klein opined Plaintiff
2 would need a "simple, straightforward" job, with not a lot of social
3 interaction, a repetitive set of limited tasks, and "a supervisor to
4 stop by once a day" to encourage and check up on Plaintiff. (*Id.*)
5 Dr. Klein also opined that Plaintiff's mental disorder would cause
6 him some problems "modulating his emotional life." (Tr. 636.) Dr.
7 Klein's opinions regarding functional limitations without the
8 effects of substance abuse/addiction are supported by the unrejected
9 psychological assessment administered by Dr. John McRae, Ph.D.,
10 while Plaintiff was living in a psychiatric supported living program
11 and "experiencing psychotic symptoms in the absence of substance
12 abuse." (Tr. 497-99.) Dr. Klein's important non-exertional
13 limitations without the effects of substance abuse/addiction were
14 neither rejected by the ALJ, nor incorporated in the second
15 sequential evaluation at steps four and five. The ALJ's failure to
16 consider these significant non-exertional limitations by accepted
17 medical sources is legal error. Further, in light of Dr. Klein's
18 testimony that Plaintiff would be able to do only certain jobs,
19 would not be suitable on the open market, and would need a
20 supportive supervisor, the ALJ's conclusory finding at step five
21 that Plaintiff's mental impairments have little or no effect on his
22 ability to do a work at all exertional levels is not supported by
23 substantial evidence.

24 **B. Steps Four and Five - Use of the Grids**

25 At step four, the Commissioner makes RFC findings, and
26 determines if a claimant can perform past relevant work. The
27 Commissioner has defined the RFC as is an "assessment of an
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1 individual's ability to do sustained work-related physical and
2 mental activities in a work setting on a regular and continuing
3 basis," i.e., for eight hours a day for five days a week, or an
4 equivalent work week. SSR 96-8p. The RFC determination must
5 address medical source opinions, and if the assessment conflicts
6 with a medical source opinion, the ALJ must explain why that opinion
7 was not adopted. *Id.*

8 If it is determined at step four that a claimant cannot perform
9 past work, or as is the case here, does not have past relevant work,
10 the ALJ continues to step five. 20 C.F.R. §§ 404.1520(a)(4)(iv),
11 (v), 416.920(a)(4)(iv), (v). At step five, the burden shifts to the
12 Commissioner to consider the claimant's RFC, age, education and work
13 experience, and show the claimant can perform other work in the
14 national economy. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
15 1984).

16 The medical-vocational guidelines (Grids) were adopted by the
17 Social Security Administration (SSA) to improve the efficiency and
18 uniformity of Social Security benefits proceedings at step five,
19 when the Commissioner is obliged to prove there are other suitable
20 jobs available. *Desrosiers v. Secretary of Health and Human Serv's*,
21 846 F.2d 573, 577 (9th Cir. 1988). Pursuant to rulemaking authority
22 granted by Congress, the SSA developed a matrix of four factors
23 (physical ability, age, education and work experience) that could be
24 used by the Commissioner to determine whether work exists that a
25 claimant can perform. This established a consistent procedure at
26 step five for identifying other jobs that did not rely on vocational
27 expert testimony. "Where a claimant's qualifications correspond to
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1 the job requirements identified by the rule, the guidelines direct
2 a [step five] conclusion as to whether work exists that the claimant
3 could perform." See *Heckler v. Campbell*, 461 U.S. 458, 461-62
4 (1983) (use of Grids upheld as valid).

5 The use of the Grids is appropriate where "a claimant's
6 functional limitations fall into a standardized pattern accurately
7 and completely described by the Grids." *Tackett*, 180 F.3d at 1103
8 (citing *Desrosiers*, 846 F.2d at 577). "Significant non-exertional
9 impairments make reliance on the Grids inappropriate." *Desrosiers*,
10 846 F.2d at 577. Non-exertional limitations are those that do not
11 depend on an individual's physical strength, such as mental,
12 sensory, manipulative and environmental limitations. *Cooper v.*
13 *Sullivan*, 880 F.2d 1152, 1155 (9th Cir. 1989). Where non-exertional
14 limitations exist, "the ALJ must examine independently the
15 additional adverse consequences resulting from the nonexertionary
16 impairment." *Id.* at 1156. The Grids are then used as a "framework,"
17 because, alone, the Grids do not fully describe the claimant's
18 abilities and limitations. *Tackett*, 180 F.3d at 1102. Further, a
19 vocational expert is required where "a claimant's non-exertional
20 limitations are in themselves enough to limit his range of work."
21 *Polly v. Bowen*, 864 F.2d 661, 663-64 (9th Cir. 1988).

22 Here, the ALJ erred at steps four and five when he failed to
23 consider the significant non-exertional mental and emotional
24 limitations identified by Dr. Klein and Dr. McRae, resulting from
25 Plaintiff's mental disorder without substance addiction. As
26 discussed above, the ALJ found Plaintiff's schizoaffective disorder
27 was severe, i.e. it "would cause more than a minimal impact on [his]
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1 ability to perform basic work activities." (Tr. 34.) This finding
2 is inconsistent with the ALJ's unexplained step five finding that
3 Plaintiff's mental limitations would have "little or no effect" on
4 his ability to do unskilled work. (Tr. 38.) The presence of
5 significant non-exertional limitations caused by a severe mental
6 impairment makes the ALJ's application of the Grids inappropriate.
7 *Polly*, 864 F.2d at 663-64. Thus, the Commissioner did not meet his
8 burden at step five to show there are a significant number of jobs
9 in the national economy Plaintiff is able to perform. Because
10 vocational expert testimony is needed to resolve the step five
11 issue, remand for additional proceedings is appropriate. *Harman*,
12 211 F.3d at 1178. Accordingly,

13 **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is
15 **GRANTED**, and the matter is remanded to the Commissioner for
16 additional proceedings pursuant to 42 U.S.C. § 405(g), including
17 testimony by a vocational expert if step five is reached;

18 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is
19 **DENIED**.

20 3. An application for attorney fees may be made by separate
21 motion.

22 The District Court Executive is directed to file this Order and
23 provide a copy to counsel for Plaintiff and Defendant. Judgment
24 shall be entered for **Plaintiff** and the file shall be **CLOSED**.

25 DATED August 14, 2009.

26 S/ CYNTHIA IMBROGNO
27 UNITED STATES MAGISTRATE JUDGE
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